American Society of International Law

The Recruitment and Use of Mercenaries in Armed Conflicts
Author(s): H. C. Burmester
Source: *The American Journal of International Law*, Vol. 72, No. 1 (Jan., 1978), pp. 37-56
Published by: American Society of International Law
Stable URL: http://www.jstor.org/stable/2199702
Accessed: 31-10-2015 22:51 UTC

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at http://www.jstor.org/page/info/about/policies/terms.jsp

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

American Society of International Law is collaborating with JSTOR to digitize, preserve and extend access to *The American Journal of International Law.*

http://www.jstor.org

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

THE RECRUITMENT AND USE OF MERCENARIES IN ARMED CONFLICTS

By H. C. Burmester *

Recent events in Angola and Rhodesia have drawn public attention to the problems which arise from the use of mercenaries in armed conflicts and civil wars. Renewed interest in the subject has also been shown by international bodies and conferences, including the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which recently adopted a treaty article on the status of mercenaries. This article examines the international legal rules applicable to states in relation to the recruitment and organizing of mercenary forces, the appropriate domestic legislation to give effect to such rules, and the status to be accorded mercenaries for the purposes of the laws of war.

I.

Problems of Definition

Any attempt to discuss the issues involved immediately confronts the problem of how to define a mercenary. A precise definition is of vital importance if such persons are to be deprived of certain legal rights and protections and if states are to be made subject to obligations with respect to them. It is difficult, however, to give a short definition of a mercenary which is satisfactory for all purposes, for it is essentially a nontechnical expression. In general, a mercenary has been regarded as a volunteer who, for monetary reward, enters into an agreement to fight for the armed forces belonging to a foreign state or an entity purporting to exercise authority over a country or people or a part thereof. In many cases, monetary reward will not be the sole, or even primary, motivation which will lead foreigners to participate in a conflict. Often, foreign volunteers will take part in an armed conflict for political or ideological reasons.

The unsatisfactory nature of any definition which relies on motivation was recognized by the Diplock Report in the United Kingdom, which reported that:

> any definition of mercenaries which required positive proof of motivation would . . . either be unworkable, or so haphazard in its application as between comparable individuals as to be unacceptable.

* The author is a Principal Legal Officer in the Australian Attorney-General's Department. He was on study leave at the University of Virginia 1976–77, when much of the work for this article was undertaken. The views expressed are the personal views of the author and do not necessarily represent the views of the Australian Government or of the Attorney-General's Department.

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

> Mercenaries, we think, can only be defined by reference to what they do, and not by reference to why they do it.[1]

Even if one concentrates on the recruitment to fight in a foreign armed force, and not on motivation, the problem remains of distinguishing mercenaries from other volunteers. The international legal policy, it is suggested below, for distinguishing mercenaries who receive some monetary reward, from other volunteers, such as those who fight because of religious conviction, for instance, is not entirely apparent. Nationals of states not parties to a conflict pose, it seems, similar problems for states, whatever the basis on which they take part in a conflict. Nevertheless, the international community appears prepared to treat mercenaries differently from other foreign volunteers. But while the distinction between mercenaries and other volunteers who engage in armed combat may not be easily made on logical or legal grounds, there is some basis for regarding foreign technical advisers, aircraft maintenance teams, and other noncombatant support personnel as not coming within any provisions relating to mercenaries. The same legal considerations are not applicable to such personnel who avoid direct combat roles as apply to those engaged in actual combat.

Any definition will also need to recognize that persons normally resident in a state party to a conflict who, although not nationals of that state, enlist in a regular way in the armed forces of that state should not be regarded as coming within any definition of mercenary. Such persons should be equated with nationals of the state in which they reside. A related problem arises from the use of permanent, integrated foreign elements in the armed forces of some countries, such as the Gurkhas in the British Army. This problem can be overcome in any definition by concentrating not so much on the foreign character of the persons recruited but rather on their recruitment especially for a particular conflict. It is this special recruitment which has the potential for raising all the problems of outside intervention, which can have the effect of aggravating a conflict. One must, in this regard, distinguish the use of forces belonging to a third state, such as the Cubans in Angola, from the use of outside, private armed forces that are not a regular part of, and owe no permanent allegiance or responsibility to, a state. It is this essentially private, nongovernmental nature of the intervention which seems to be the basic problem which is raised by the use of mercenaries. It also provides a key to an appraisal of the appropriate international legal response to the problem of mercenaries. The most recent attempt to define and regulate the use of mercenaries seems, however, largely to ignore this wider context and concentrates on the motivation of individuals and not on the nature of their activity.

At the 1976 and 1977 sessions of the Conference on International Humanitarian Law, considerable attention was given to the question of a suitable

[1] Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries, Cmnd. 6569, para. 7 (August 1976).

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

definition of a mercenary.[2] While at the 1976 session an agreed definition was not adopted, the Report of Committee III was able to indicate the principal elements in a definition that appeared to be accepted by states.[3] At the 1977 session, Nigeria, which had introduced the original proposal at the previous session,[4] was able by informal negotiations to gain widespread agreement to a definition. Consideration in the Working Group and Committee III led, with little further debate, to the adoption of a provision on mercenaries by consensus early in the session.[5] This provision was adopted by plenary and, with minor drafting committee changes, became Article 47 of Protocol I.

The definition that states are now invited to ratify as part of the Protocol reads as follows: A mercenary is any person who:

> (a) is specially recruited locally or abroad in order to fight in an armed conflict;
> (b) does, in fact, take a direct part in the hostilities;
> (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
> (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
> (e) is not a member of the armed forces of a Party to the conflict; and
> (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

The article also provides that mercenaries as so defined shall not have the right to be a combatant or a prisoner of war.[6]

The definition that was adopted is quite narrow, all its components having to be established before a person will come within its scope. It takes account of the special cases outlined above, which it was suggested should fall outside any definition. But it still defines mercenaries by reference to motivation, and the difficulties with such an approach have been indicated above.[7] The requirement to establish that payment is *in fact* substantially in excess of that paid to combatants of similar rank and function in the armed forces of the party to the conflict introduces a new element. Although it was intended to provide "an objective test" [8] of motivation, it is likely to be difficult to establish in many cases. The definition was drafted deliberately in such a way as to reduce the risk that the article could be

[2] For a discussion of the 1976 session, see Van Deventer, *Mercenaries at Geneva*, 70 AJIL 811 (1976).

[3] Doc. CDDH/III/361/Add.1 (June 7, 1976).

[4] Doc. CDDH/III/GT/82 (May 13, 1976).

[5] *See* Doc. CDDH/III/374 (April 29, 1977) for text as adopted by the Committee.

[6] Art. 47(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). For text of Protocol, see 16 ILM 1391 (1977).

[7] *Supra* note 1 and accompanying text.

[8] See the Report of Committee III, para. 26, Doc. CDDH/III/408 (May 12, 1977).

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

misused; [9] it represents the first successful attempt to define mercenaries legally, and its narrow scope should help to prevent indiscriminate accusations of mercenary status being made against all but the most traditional of paid foreign volunteers. Yet, one cannot ignore the circumstances that lie behind its adoption. Recent interest in the subject has largely arisen from the use of mercenaries in conflicts on behalf of either racist or colonialist regimes against local national liberation movements. The application of the definition by many states is likely to reflect these ideological overtones. Some concern as to the manner in which the definition will be applied may, therefore, be justified.

Despite the concentration at the Conference on International Humanitarian Law on a satisfactory definition of a mercenary, relatively little attention appears to have been given to the reasons, other than ideological, for singling mercenaries out, in the first place, for treatment different from that accorded to regular armed forces or guerrillas or other outside forces. Yet, if the problem is viewed in a wider context than that of colonialist or racist wars and is seen as part of the broader problem of seeking to regulate outside intervention in armed conflicts in general, it is suggested that a better appreciation of an appropriate legal framework in which to regulate mercenaries may be gained.

It should be remembered that mercenaries have, in fact, long been a subject of legal concern. They have been used in wars down the centuries, and until the growth of the modern nation state with its standing army and universal conscription they were an essential component of any war.[10] They have, however, traditionally been viewed with hostility and suspicion, being regarded as greedy and ruthless men prepared to make a quick fortune by killing. Their use in both internal and international armed conflicts has not gone unnoticed by governments and international organizations which have had to grapple with the problems that they pose. Mercenaries were a subject of complaint as early as the American Declaration of Independence in 1776.[11] In the Spanish Civil War, the Non-Intervention Committee spent much time seeking to control the use of foreign volunteers. There the large number of volunteers were involved primarily for ideological reasons and not for monetary reward. In the Congo, the UN Security Council was confronted with problems arising from the use of mercenaries; and Angola put on public trial mercenaries captured during the recent conflict in that country. Even earlier, publicists had written on the subject of mercenaries. Many of these early writings recognized, however, that the treatment to be accorded mercenaries themselves was only one aspect of the problem. By far the more important issue was the question of what obligations a state itself was to assume in order to restrict the recruitment or use of mercenaries in the first place. It is this

[9] *Id.* para. 25.

[10] A. MOCKLER, MERCENARIES, Ch. 1 (1970).

[11] ". . . He is at this time transporting large armies of foreign mercenaries to compleat the works of death, desolation and tyranny . . ."

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

issue, with which the traditional law primarily deals, that this article will first consider.

II.

The Traditional Law

The subject of mercenaries has received the attention of publicists over several centuries. Vitoria, for instance, regarded mercenaries who were prepared to fight in any conflict, regardless of whether it was just or not, as committing a mortal sin.[12] Suarez, in 1621, could undertake a detailed consideration of the moral issue and conclude that there was no objection to the use of mercenaries in situations where there was a great probability that the war was just.[13] By the time that Bynkershoek wrote in 1737 the moral issue had largely disappeared. He saw no difference between the making of a contract of hire for soldiers in friendly territory and any other contract of hire or sale.[14] Vattel also saw no problem with the recruitment of foreign soldiers provided their sovereign consented or at least left them at liberty to enlist.[15] By the latter part of the 19th century, despite the growth of standing armies and the early development of the law of neutrality, publicists still saw few difficulties in the use of mercenaries. Calvo, for instance, saw no problem in the employment of foreign troops which were to be completely assimilated to national troops for purposes of the laws of war.[16] Twiss, writing in 1863, considered it was permissible to allow recruitment, it being up to the neutral state to consider whether it wished to prevent this.[17] Lorimer appears to have taken a similar view, but suggested that, for the duration of the enlistment, the soldier lost his neutral citizenship and was to be regarded as a citizen of the belligerent.[18] By the early part of this century, however, a distinction was being drawn between the active participation or condonation of recruitment by a state on its territory and the acts of individual citizens leaving to join a force of their own accord.[19] It is essentially this distinction which continues to represent the traditional law on the subject.

The obligation of states under international law to prevent the recruit-

[12] "Those who are prepared to go forth to every war, who have no care as to whether or not a war is just, but follow him who provides the more pay, and who are, moreover, not subjects commit a mortal sin, not only when they actually go to battle, but whenever they are thus willing." F. Vitoria, *De bello*, Art. I, §8. Quoted in 2 J. B. Scott, Law, the State and the International Community 328 (1939).

[13] F. Suarez, De Triplici Virtute Theologica 832–35 (Trans., Classics of International Law ed. (1944)).

[14] C. van Bynkershoek, Quaestionum Juris Publici Libri Duo 125 (Trans., Classics of International Law ed. (1930)).

[15] E. de Vattel, The Law of Nations or the Principles of Natural Law, 240 Trans., Classics of International Law ed. *reprinted* 1964).

[16] 4 C. Calvo, Le Droit International 131 (4th rev. ed. 1888).

[17] T. Twiss, The Law of Nations, 453–54 (1863).

[18] 2 J. Lorimer, The Institutes of the Law of Nations 179 (1884).

[19] *See*, for instance, W. E. Hall, A Treatise on International Law 714–75 (8th ed. 1924); 2 C. C. Hyde, International Law Chiefly as Interpreted and Applied by the U.S. 703–04, 758 (1922).

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

ment or organizing of mercenary forces has generally been discussed by modern publicists in the context of the obligation of a neutral state to be impartial. The view of many publicists [20] has been that the customary international law is reflected in the provisions of Articles 4 and 6 of the 1907 Hague Convention regarding the Rights and Duties of Neutral Powers and Persons in Case of War on Land.[21] These articles respectively provide:

> Corps of combatants must not be formed nor recruiting agencies opened on the territory of a neutral Power, to assist the belligerents.
>
> The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separating (*sic*) to offer their services to one of the belligerents.

While, therefore, a neutral state is under an obligation not to allow the formation of armed expeditions or to permit recruiting offices to be opened on its territory, a neutral state appears to have no obligation under customary international law to prevent persons, whether its own or foreign nationals, from crossing its borders to enlist in the armed forces of a belligerent. However, states, both in treaties and by domestic legislation, have at times considered it advisable to control the exit from their territory of individuals having the intention of enlisting in foreign forces and have accepted responsibilities beyond those imposed by customary international law.

As early as the Jay Treaty between the United States and Great Britain,[22] concluded in 1794, it was agreed that the subjects and citizens of one state were not to accept commissions to serve in the armed forces of any foreign prince or state, enemies to the other state. A more recent example of a treaty imposing obligations additional to those under customary international law is the 1923 General Treaty of Peace and Amity of the Central American States, which provides that:

> None of the Contracting Governments will permit the persons under its jurisdiction to organize armed expeditions or to take part in any hostilities which may arise in a neighboring country.[23]

The 1928 Habana Convention on Maritime Neutrality also provides in Article 23 that:

> Neutral states shall not oppose the voluntary departure of nationals of belligerent states even though they leave simultaneously in great numbers; but they may oppose the voluntary departure of their own nationals going to enlist in armed forces.[24]

[20] For example, 2 L. OPPENHEIM, INTERNATIONAL LAW 703 (7th ed. H. Lauterpacht 1952); 2 J. WESTLAKE, INTERNATIONAL LAW 210 (2d ed. 1913); M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 546 (1959).

[21] 36 Stat. 2310; TS No. 540; 1 BEVANS 654; 2 AJIL Supp. 117 (1908).

[22] 8 Stat. 116; TS No. 105; 12 BEVANS 13, Art. 21.

[23] *Adopted,* Feb. 7, 1923. 2 M. O. HUDSON, INTERNATIONAL LEGISLATION 901 (1932). Art. 14.

[24] *Adopted,* Feb. 20, 1928. 47 Stat. 1989, TS No. 845, 2 BEVANS 721, 135 LNTS 187.

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

These additional obligations on states to control the departure of their own nationals cannot, however, be said to have been clearly embodied in customary international law, which still appears to be limited to the obligations in the Hague Convention set out above. More recent developments in the United Nations appear to support this conclusion.

In the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[25] the following statement appears under the principle that "States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations":

> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

This statement continues to limit the obligations of states to control of the actual organization of mercenary and other irregular forces. There is no obligation imposed on states actually to prevent their own nationals from joining a mercenary force. Nor does such an obligation emerge in the definition of aggression adopted by the UN General Assembly in 1974,[26] which provides that "the *sending* by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State" of such gravity as to amount to certain prescribed acts shall qualify as an act of aggression (emphasis added). No longer is the actual organization of such forces clearly proscribed. This merely reflects one of the many shortcomings in the definition, which cannot be seen as a full statement of the relevant law.[27]

While the customary international law may be as set out above, it is necessary to consider whether the maintenance of a peaceful world order does not require an extension of the duties thus far imposed on states. The basis for the obligation of states to control the recruiting and organizing of mercenary and other irregular forces on their territory has traditionally been founded on the duty of impartiality imposed on a neutral state. Any consideration of the problem today cannot ignore, however, the major changes in the legal order that the United Nations Charter has brought about. The right to resort to force and to provide assistance to another state under attack have been severely curtailed in the case of international conflicts. Use of mercenaries in such conflicts may reasonably be regarded as foreign intervention, although no third state may be

[25] GA Res. 2625. 25 GAOR. Supp, (No. 28) 121, UN Doc. A/8028 (1970).

[26] GA Res. 3314, Art. 3(g). 29(1) GAOR, Supp. (No. 31) 143, UN Doc. A/9631 (1974), 69 AJIL 480 (1975). *Compare* the most recent resolution which condemned both the recruitment and sending. GA RES. 31/91. 31 GAOR, Supp. (No. 39) 42, UN Doc. A/31/39 (1976).

[27] *See* Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AJIL 224 (1977).

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

directly involved or approve of the use of its nationals in a mercenary force. Mercenaries can be seen as private outside forces not under the effective control of any state except that by which they are engaged. If one accepts as a primary goal the minimization of armed conflict, the use of outside private armed force, often in situations where the Charter would prohibit formal state intervention, seems a legitimate matter for concern and legal regulation. Developments in international law since 1945 suggest that a more satisfactory basis for an obligation to control the use of mercenaries may thus be found in the duty of a state to prevent the commission of injurious acts against foreign states rather than in any duty of neutrality. In the case of noninternational armed conflicts, although the appropriate legal norms governing outside intervention by states remain a matter of controversy,[28] the use of outside private force appears to raise similar problems to those that arise from its use in international conflicts. Any duty imposed on states not to intervene in the internal affairs of other states is likely to be compromised by the use of outside private force. In these circumstances, while commentators may not be able to agree on the primary legal norms applicable to intervention by *states,* it would seem reasonable that outside *private* intervention, in a form not under state auspices, should be severely circumscribed, if not completely proscribed. Such an approach would help to minimize any conflict and avoid the unwitting involvement of states, which might otherwise find themselves drawn into a conflict through the presence of their nationals in a mercenary force.

The suggestion that the use of outside private force should be proscribed in both international and noninternational conflicts may be readily accepted in theory, but one cannot ignore the distinction drawn in traditional law between the acts of a state itself and the acts of its nationals in leaving a country to join a foreign force. An important question which must be faced is the extent to which one should impute responsibility to a state in circumstances where the actions of individuals will largely occur outside the territory of the state itself. It is suggested that an examination of conflicts where mercenaries, or other private forces, have been used indicates that a threat to peace and security can be posed by their use and that for this reason, if for no other, states should have a responsibility to control their nationals beyond that recognized under traditional customary international law.

The limited extent of the customary law obligation imposed on states to prevent the recruitment of volunteers and armed bands reflects the hesitation of traditional law to impute responsibility to a state for the actions of individuals except in certain limited circumstances. The Hague Convention of 1907 regarding the Rights and Duties of Neutral Powers (Article 7) and the Convention respecting the Rights and Duties of Neu-

[28] *See* Moore, *The Control of Foreign Intervention,* 9 VA. J. INT. L. 205 (1969); Farer, *Intervention in Civil Wars: A Modest Proposal,* 67 COL. L. REV. 266 (1967).

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

tral Powers in Naval War (Articles 6 and 7)[29] make a similar distinction between the supply of war materials to belligerents by private individuals and by states themselves, imposing restrictions only in the latter case. Such differing rules are based, however, on an outmoded distinction between the governmental sphere and that of the individual.[30] Private actions of individuals can, in certain circumstances, have a major impact on interstate relations; and it no longer seems realistic not to impute responsibility to a state for the actions of persons under its jurisdiction and control in situations likely to endanger world peace and security. Such a responsibility could arise not from any implication of complicity by the state in the acts of the individuals but from the recognition that the modern state can, and must, exercise control over its nationals so as to prevent their involvement in activities contrary to international law and, in particular, so as to enable the state to fulfill its own obligation to respect the territorial integrity and political independence of other states. Today, all states, including those which uphold a private enterprise system, have no hesitation in imposing numerous export restrictions, foreign exchange controls, and other government supervision over contracts and enterprises involving the export of war materials.[31] This illustrates the growing recognition by states that they cannot ignore activities by their nationals which may affect world peace and security.

Even if one accepts a certain responsibility by states to exercise reasonable control over their nationals in circumstances likely to affect peace or security, the question remains how far this duty extends. Traditional law does not normally attribute responsibility to a state for injuries caused by persons under its jurisdiction and control, if it has exercised "due diligence" in the circumstances of a particular case.[32] In the case of individuals leaving a country it may be regarded as unreasonable to attribute responsibility to a state for their subsequent actions which may take place without the knowledge, and beyond the control, of the state.[33] This explains why the customary law, as indicated above, looks for some state complicity in the recruitment of mercenaries before attributing responsibility to the state. Yet, such an attitude fails to recognize that the presence of foreign individuals, especially if on a large scale, can have a significant impact on any conflict and may draw into the conflict those states whose nationals are involved. This involvement need not necessarily be as a participant but as an interested party concerned to ensure the protection of its nationals. This conclusion is supported by events in

[29] *Supra* note 21.

[30] M. GARCIA-MORA, INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES 68 (1962).

[31] *See,* MANUAL OF PUBLIC INTERNATIONAL LAW 841 (Sørenson ed. 1968).

[32] *See,* for instance, draft Article 10 of the Harvard Draft Articles on Responsibility of States, RESEARCH IN INTERNATIONAL LAW, 23 AJIL Spec. Supp. 187 (1929).

[33] *Id.* The comment to that article includes the following:

> "Due diligence" assumes that the state has jurisdiction to act. It would usually be impossible for a state to take measures to prevent injuries from being inflicted by its nationals in the territory of other states.

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

conflicts such as the Congo, which is discussed below. The modern state does have substantial powers at its disposal to control the movement and activities of its nationals. Once a state becomes aware of an international or internal conflict it can, by domestic penal measures and administrative controls, impose considerable controls on its nationals. It no longer seems realistic to enable a state to disclaim all responsibility for the participation of its nationals in situations of armed conflict that may pose a threat to world peace and security.[34]

Under the United Nations Charter the Security Council can determine the existence of a threat to the peace, breach of the peace, or act of aggression (Article 39) and may decide on measures to be taken to maintain and restore international peace and security. A decision by the Security Council that a threat to the peace exists and that, in order to prevent its escalation, it is necessary to prohibit the use of mercenaries would seem clearly to impose an obligation on states to prevent their nationals from being employed as mercenaries. Only by recognition of such an obligation could effective implementation of such a decision by the Security Council be obtained. Even where no positive finding of a threat to the peace has been made by the Security Council, the same considerations suggest that states should accept that the involvement of their nationals in any armed conflict is a matter for national regulation.

One way in which to exercise control may be for a state to restrict the exit of its nationals. The argument may be made, however, that such a restriction conflicts with the law on human rights that has come to be internationally accepted. The Universal Declaration of Human Rights provides in Article 13, paragraph 2, that "Everyone has the right to leave any country, including his own, and to return to his country." [35] Article 12, paragraph 2, of the Covenant on Civil and Political Rights provides in part that "Everyone shall be free to leave any country, including his own." [36] Any attempt to prevent persons leaving a country to join a foreign armed force may be met with domestic opposition and may be seen to be contrary to internationally recognized human rights. It should be remembered, however, that these rights are not unlimited [37] and that they must be subject to an obligation not to endanger the peace and security of mankind. A prohibition on leaving a country in order to prevent participation in an armed conflict would not seem inconsistent with the principles of the Covenant and Declaration. The difficulty of enforcing any such prohibition is, however, recognized. Individuals could easily leave under the pretense of some legitimate purpose but once

[34] Several states at the Conference on International Humanitarian Law would have liked the provision on mercenaries to have dealt with the scope of responsibility of states that encourage or allow recruitment and enlistment of their citizens as mercenaries. *See* Report of Committee III, *supra* note 8, para. 24.

[35] GA Res. 217, UN Doc. A/811 (1948), 43 AJIL Supp. 127 (1949).

[36] GA Res. 2200. 21 GAOR, Supp. (No. 16) 54, UN Doc. A/6316 (1966), 61 AJIL 870 (1967).

[37] *See* Art. 12(3) of the Covenant on Civil and Political Rights, *supra* note 36.

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

abroad enlist as a mercenary. Any attempt to withdraw or restrict the issue of passports to individuals is also unlikely to prevent a potential mercenary from reaching his destination.[38]

In any case, a state would seem able to penalize an individual's joining a mercenary force in ways which need not necessarily restrict the exit of its nationals. States have a recognized right to exercise criminal jurisdiction over their nationals in respect of offenses committed anywhere, even though in the Anglo-American tradition, extraterritorial jurisdiction has been largely confined to serious offenses.[39] Actions by nationals of a state likely to endanger peace and security would seem to be appropriate matters over which to exercise extraterritorial criminal jurisdiction.

While it has been argued above that states should attempt to exercise control over the actions of their nationals in order to prevent their involvement as mercenaries in armed conflicts, it is recognized that any such attempt will be seen as inconsistent with the freedom of the individual. The Diplock Report in Great Britain emphasized this aspect of the problem. The Report considered that protection of the mercenary himself from the risk of death or injury was not sufficient justification for the state to prohibit enlistment.[40] The principal public interest was seen to be the "maintenance of good international relations," and any restriction on the right of an individual to join a mercenary force was considered to require a "compelling reason of public policy."[41] The Report failed, however, to give any consideration to the broader issue of the consequences to world peace and security which arise from the use of outside, private armed force. Considerations of individual liberty need to be balanced by considerations relating to the minimization and avoidance of armed conflict likely to endanger world peace. Past conflicts provide useful illustrations in this respect.

III.

Reaction of the International Community to the Use of Mercenaries

A study of conflicts in which mercenaries and other volunteer forces have been used indicates that the world community has not looked kindly on their use but has sought to limit their use in the various conflicts as quickly as possible. This response lends support to the view expressed above that the use of foreign nongovernmental forces draws into the

[38] The Diplock Report recognized the unsatisfactory nature of any attempt to control movement by restrictions on passports. *Supra* note 1, paras. 18–23. For a brief discussion of difficulties in the United States of restricting movement by the use of passports, see H. Steiner and D. Vagts, Transnational Legal Problems 130–31 (2d ed. 1976).

[39] *See,* for instance, 2 D. P. O'Connell, International Law 825 (2d ed. 1970).

[40] *Supra* note 1, para. 11.

[41] *Id.* paras. 12, 15. The Report did not consider such a high standard had to be met before restrictions on activities connected with the actual recruitment of mercenaries were justified, as distinguished from enlistment.

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

conflict the states whose nationals are involved. The reactions of states, as illustrated below, strengthens the argument that they should assume a responsibility to control the participation of their nationals in both internal and international armed conflicts. The most recent use of mercenaries in the Angolan conflict produced some international reaction which would no doubt have increased had it not been for the quick end to the conflict. Attention continued to be focused on the subject, however, by the public trial of mercenaries captured by the Angolan Government.[42] Although mercenaries were used by both sides in the Nigerian civil war, they were not primarily used in a combat role, other than as airmen, and then not on a large scale.[43] Their use was not, therefore, a matter for significant international reaction. Mercenaries have also been used in other internal armed conflicts, including those in Oman and Yemen. The Spanish Civil War saw the employment of private foreign forces on a large scale by both sides. Many were motivated by ideological considerations. Others, although called volunteers, were regular soldiers of the Italian and German armed forces. Mercenaries, in the sense of volunteers for monetary reward, were almost wholly absent from this conflict. For this reason, the conflict differs from many of the other conflicts in which mercenaries have been used. Nevertheless, the presence of large numbers of private volunteers in Spain led to positive action on the part of almost every European government to deter the recruitment of volunteers and to restrict the export of war material.[44]

A more recent example of international reaction to the use of outside private forces is provided by the conflicts in the Congo. The employment of mercenaries by the Katanga secessionists in the Congo from 1960 to 1963 and their subsequent use by the Tshombe and Mobutu Governments against the Simbas from 1964 onwards marked the first occasion since the Spanish Civil War that private foreign volunteer forces had been employed on a large scale.[45] Recruitment for the Congo was both open and widespread. Missions were sent to Belgium and France in 1960, and at the beginning of 1961 recruiting offices were opened in South Africa.[46] The use of mercenaries did, however, quickly come to be a

[42] For information on Angola, see *Mercenaries in Africa: Hearings before the Special Subcomm. on Investigations of the House Comm. on International Relations*, 94th Cong. 2d Sess. (1976). For an account of the trial by one of the defense counsel, see Cesner & Brant, *Law of the Mercenary: An International Dilemma*, 6 CAPITAL U. L. REV. 339 (1977); and Note, *The Laws of War and the Angolan Trial of Mercenaries: Death to the Dogs of War*, 9 CASE WESTERN RESERVE J. INT. L. 323 (1977).

[43] *See* J. DE ST. JORRE, THE NIGERIAN CIVIL WAR Ch. 12 (1972); D. S. P. CRONJÉ, THE WORLD AND NIGERIA (1972); MOCKLER, *supra* note 10, at 279.

[44] For a detailed account, see H. THOMAS, THE SPANISH CIVIL WAR (1961). Also see N. PADELFORD, INTERNATIONAL LAW AND DIPLOMACY IN THE SPANISH CIVIL STRIFE 311 (1939). Chapter 3 contains a detailed account of the nonintervention system and Appendix V sets out the texts of legislative and other measures adopted by states to restrain the departure of volunteers.

[45] See S-J. CLARKE, THE CONGO MERCENARY (1968) for a general description of the use of mercenaries in the Congo conflicts.

[46] *Id.* Ch. 3.

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

subject of UN attention. In a resolution of February 21, 1961, the Security Council urged the immediate withdrawal from the Congo of all Belgian and other foreign military and paramilitary personnel ". . . and mercenaries." [47] Subsequently, in a resolution adopted on November 24, 1961 [48] the Security Council authorized the Secretary-General to take vigorous action, including the use of force, if necessary, for the immediate apprehension, detention, and deportation of all foreign advisers and mercenaries.

While ONUC forces arrested and expelled some mercenaries, recruitment continued. This was despite a clear call by the Security Council in its February 21 resolution for:

> all States to take immediate and energetic measures to prevent the departure of such personnel [*i.e.*, military and paramilitary personnel, political advisers and mercenaries] for the Congo from their territories, and for the denial of transit and other facilities to them . . . .[49]

This resolution constitutes a clear statement by the Security Council of an obligation on states to prevent the departure of their nationals who have an intention of serving as mercenaries and of an obligation not to provide facilities or otherwise to assist such persons. It can be argued that the obligation imposed on states by the Security Council was in the exercise of its powers to prevent a breach of the peace and related only to the situation in the Congo and thus did not reflect a general norm of international law. The resolutions do, however, indicate the attitude that may well be taken by the Security Council toward the use of mercenaries in any future conflict likely to involve a threat to the peace.

After the end of the Katanga secession some of the mercenaries returned to Europe while others remained in Portuguese Angola. When the Simba revolt broke out in 1964, Tshombe moved quickly to organize an effective fighting force led by mercenaries. After General Mobutu took over the presidency in November 1965, many of the South African and Rhodesian mercenaries recruited by Tshombe were replaced by largely French-speaking mercenaries.[50] Mercenaries also continued to be involved in plans to restore Tshombe, with Angola apparently being used as a base. Following complaints from the Democratic Republic of the Congo, the Security Council on July 10, 1967 adopted a resolution which condemned any state which persisted "in permitting or tolerating the recruitment of mercenaries . . . with the objective of overthrowing the Governments of State Members of the United Nations" and called upon governments to ensure that their territory as well as their nationals were not used for the recruitment, training and transit of mercenaries designed to overthrow the Government of the Democratic Republic of the Congo.[51] This followed an earlier resolution of October 14, 1966,[52] which urged Portugal not to

[47] SC Res. 161. 16 SCOR, RES. & DEC. 2, UN Doc. S/4741 (1961).
[48] SC Res. 169. *Id.* 4, UN Doc. S/5002 (1961).
[49] *Supra* note 47.
[50] CLARKE, *supra* note 45, at 68.
[51] SC Res. 239. 22 SCOR, RES. & DEC. 13 (1967).
[52] SC Res. 226. 21 SCOR, RES. & DEC. 13 (1966).

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

allow foreign mercenaries to use Angola as a base of operations for interference in the domestic affairs of the Congo. The Security Council in a further resolution on November 15, 1967 [53] condemned in particular the failure of Portugal to prevent the mercenaries from using Angola as a base of operations for armed attacks against the Congo. The use of mercenaries in Africa has also been condemned by the Organization of African Unity, which has urged states to take action to prevent their nationals from being used as mercenaries.[54]

The use of mercenaries in the Congo on a large scale provoked considerable opposition. The repeated calls of the Security Council for foreign states to cease assisting mercenaries and for the adoption of measures to prevent their departure and the continued appeals for the end of foreign intervention clearly lend weight to the view that a state has an obligation to control the recruitment of its nationals in situations where a threat to peace and security exists. Such an obligation goes beyond that recognized in traditional customary international law.

IV.

Legislative Action by States

Apart from the reactions of the international community, provisions in the domestic legislation of certain states indicate a willingness by such states to impose controls over nationals inclined to serve in foreign armed forces. The laws of the United States, the United Kingdom, and Australia are mentioned briefly here as examples.

United Kingdom

In the United Kingdom the Foreign Enlistment Act of 1870 [55] makes it an offense punishable by fine and imprisonment for a person being a British subject, without the license of Her Majesty, within or without the dominion, to accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with Her Majesty (section 4). It is also made an offense to board any ship (but not an aircraft) with a view to leaving the jurisdiction with the intent to accept a commission or engagement proscribed by section 4 (section 5). Service as a mercenary is not itself an offense. The Act also penalizes the master or owner of a ship taking on board a person who has agreed to serve with a foreign state or who is leaving the country with that intent (section 7). The Act is applicable to internal civil conflicts only if the insurgents exercise some regular control over part of the territory of a state. It is doubtful if the Act can apply

[53] SC Res. 241. 22 SCOR, Res. & Dec. 14 (1967).

[54] For the texts of OAU declarations on mercenaries in 1964, 1967, 1970, and 1971, see Cesner & Brant, *supra* note 42, at 363–67.

[55] 33 and 34 Vict. ch. 90.

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

to enlistment in a guerrilla force or security force used to suppress guerrillas.[56]

The inadequacy of the Act for present conditions was highlighted by events in Angola which led directly to the inquiry by Lord Diplock into the existing controls over the recruitment of mercenaries. The Diplock Report recognized the unsatisfactory nature of the Act, which is out of date and largely unworkable in practice. It therefore recommended the repeal of the provisions in relation to illegal enlistment and suggested that enlistment as a mercenary should cease to be a criminal offense; service as a mercenary abroad should not be made a new offense. New legislation should, it was recommended, merely empower the prohibition of recruitment in the United Kingdom of mercenaries for service in specified armed forces abroad.[57]

It is submitted that the Report fails to consider the question of mercenaries in the broader global context, but concentrates merely on domestic problems of law enforcement. The Report, for instance, stresses the evidentiary difficulties of proving on the return of a mercenary that he had in fact enlisted.[58] It does not stress the important deterrent effect that an offense of enlistment may have. The Report concluded that there was not sufficient compelling public interest to overcome the practical difficulties of proof of motivation or actual conduct while overseas. But the Report took a different approach to activities within the United Kingdom related to the recruitment of mercenaries, such as advertising or the conclusion of arrangements, including the payment of money, to assist a person to enlist. It recommended that such activities should be prohibited but that a specific executive order should be necessary before the prohibition would become effective with respect to any specific conflict.

At the time of writing, no legislation giving effect to the recommendations has been introduced, and it is not known whether they will in fact be adopted. As already noted, however, the Report does not make recommendations that adequately take account of the international legal order which seeks to regulate armed conflict. For the reasons indicated above, it would be desirable for international legal norms to impose a responsibility on states to take reasonable action to prevent the enlistment of their nationals as mercenaries. The recommendations of the Diplock Report may not lead to the adequate carrying out of the responsibility of states in this regard.

[56] *See* the definition of "foreign State" contained in section 30 of the Act and the Diplock Report, *supra* note 1, para. 36.

[57] *Id.* para. 52.

[58] *Id.* para. 42:

> The practical difficulties of proving such an offence (i.e. an offence of enlistment) would mean that there could be very few successful prosecutions; and the chances of convicting the accused would depend not so much on his actual guilt as on his exceptional bad luck in there being available to the prosecution in his case sufficient evidence to convict him on his trial in this country.

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

United States

In the United States, the first law dealing with foreign enlistment was enacted in 1794. Subsequent laws have been passed extending its scope.[59] The present provisions,[60] based on a 1909 law, make it an offense for a person to accept a commission or to enlist in or agree to go abroad with the purpose of enlistment in a foreign force. They also make it an offense to recruit in the United States, but it is necessary to show that some agreement or understanding has been entered into. A mere advertisement is not proscribed.[61] The provisions are applicable to civil as well as international conflicts. But, in contrast to the United Kingdom legislation, the U.S. provisions only apply to acts within the country. Thus, if a person goes abroad voluntarily and enlists in a foreign force, he will not be subject to prosecution.[62]

Section 1481 of Title 8 of the United States Code provides that a U.S. national will lose his nationality if he enters or serves in the armed forces of a foreign state unless authorized in writing by the Secretary of State and the Secretary of Defense. It may be that this provision is unconstitutional.[63] It would seem, however, that the possible loss of citizenship may well have a deterrent effect on persons inclined to join a foreign force. The Foreign Agents Registration Act[64] may also apply to the activities of any persons who, it can be established, seek to recruit persons on behalf of a foreign government.

The adequacy of these laws to protect U.S. citizens and to meet the obligations of the country itself have been the subject of recent congressional attention.[65] The principal matter for concern appears to be the spate of advertisements which have appeared in a number of sporting magazines. Any restraints on advertising could, it has been suggested, be attacked on constitutional grounds.[66] While administration officials indicated that they saw little need for change in the existing law, it is suggested that a much closer look at the adequacy of existing laws to meet

[59] Dumbauld, *Neutrality Laws of the United States,* 31 AJIL 258 (1937).

[60] 18 U.S.C. §§958, 959.

[61] Gayon v. McCarthy, 252 U.S. 171 (1920).

[62] Wiborg v. United States, 163 U.S. 632 (1896).

[63] In *Afroyim v. Rusk,* 387 U.S. 253 (1967), the Supreme Court by a 5–4 decision ruled a provision of section 1481 that deprived a person of his citizenship if he voted in a foreign election as unconstitutional by reason of the Fourteenth Amendment. Actual enlistment in a foreign force and the taking of an oath of allegiance may, however, amount to an effective voluntary renunciation of citizenship.

[64] 22 U.S.C. §§611 *et seq.*

[65] *Supra* note 42, where Robert L. Keuch, Deputy Assistant Attorney General, described the relevant law and its adequacy. *Reprinted* in part in 71 AJIL 141 (1977). An amendment, introduced by Senator McGovern on June 16, 1977, to the Foreign Relations Authorization Act (H.R. 6689) makes it unlawful for any person within the United States, who is not legally authorized, to participate in any act of sabotage or any military or paramilitary operation against any foreign state with which the United States is not at war. 123 CONG. REC. S9941 (daily ed. June 16, 1977).

[66] Statement by Robert L. Keuch, *supra* note 65.

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

the appropriate obligations that a state might assume to control its nationals, as part of its duty to avoid the spread of armed conflict, is timely. Congress and the Executive should not wait until another Angolan situation occurs. Already there are reports of Americans involved in Rhodesia. Any escalation of conflict in that part of the world is likely to lead to the presence of mercenaries and the adequacy of existing legislation is again likely to arise.

Australia

The most recent attempt to legislate to control mercenaries has occurred in Australia, where legislation has been proposed to make it an offense to recruit a person in Australia to serve in any capacity with an armed force in a foreign country, whether or not the armed forces form part of the armed forces of the government of a foreign country.[67] It is also made an offense to publish an advertisement for the purpose of recruiting or containing any information relating to service in a foreign armed force. The proposed legislation does not make it an offense to enlist outside Australia or actually to perform service in a foreign armed force.[68] The bill provides for an exemption to be issued in order to permit the recruitment in Australia of persons to serve in particular armed forces when it is in the interests of the defense or international relations of Australia. The proposed legislation would also prohibit persons from preparing for or engaging in incursions into foreign countries. The proposed legislation avoids the problem of defining mercenaries since it would apply to the recruitment of persons to serve in foreign armed forces in any capacity.

V.

TREATMENT TO BE ACCORDED MERCENARIES UNDER THE LAWS OF WAR

Along with the growing acceptance by states of some obligation to deter the recruitment of mercenaries, considerable attention has been given to the status to be accorded mercenaries themselves. Under the existing laws of war, aliens who enlist in a foreign force commit no offense against international law, and they are treated the same, as regards the enemy, as the nationals of the state whose force they have joined.[69] This position is reflected in Article 17 of the Hague Convention No. V of 1907 which provides that a neutral cannot avail himself of his neutrality if he voluntarily enlists in the ranks of the armed forces of one of the parties. The article also provides:

> In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act.[70]

[67] Crimes (Foreign Incursions and Recruitment) Bill 1977.

[68] *See* the Second Reading speech by the Attorney-General, HANSARD (House of Representatives), 17 March 1977, at 342, for a brief explanation of the bill. The bill had not been passed when Parliament was dissolved in November 1977.

[69] OPPENHEIM, *supra* note 20, at 261. [70] *Supra* note 21.

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

Under the 1949 Geneva Convention on the Treatment of Prisoners of War [71] mercenaries are entitled to prisoner-of-war treatment without distinction, provided they belong to or form part of the armed forces, militia, or other volunteer forces whose members are otherwise entitled to such treatment.[72] However, recent events in the United Nations and at the Diplomatic Conference on International Humanitarian Law indicate a move to regard mercenaries as not subject to certain protections of the laws of war, especially where they are used against national liberation movements fighting colonialist or racist regimes.

As early as 1968 in a resolution on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, the General Assembly declared:

> that the practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and that the mercenaries themselves are outlaws, and calls upon the Governments of all countries to enact legislation declaring the recruitment, financing and training of mercenaries in their territory to be a punishable offence and prohibiting their nationals from serving as mercenaries.[73]

This paragraph was introduced by the Soviet Union on behalf of a number of East European countries toward the end of debate on the resolution. It was not debated. After the adoption of the resolution as a whole, several Western European countries recorded their reservations on this paragraph. The declaration was, however, reiterated in Resolution 2548 (XXIV) of December 11, 1969 [74] and Resolution 2708 (XXV) of December 14, 1970.[75] In Resolution 3103 (XXVIII) of December 12, 1973 on the "Basic Principles on the Legal Status of Combatants Struggling Against Colonial and Alien Domination and Racist Regimes," the following "basic principle" was proclaimed:

> 5. The use of mercenaries by colonial and racist régimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.[76]

The principles contained in these resolutions received the support of some countries at the 1975 session of the Diplomatic Conference on International Humanitarian Law in Armed Conflicts. In discussion of draft Article 42 [77] on the status of prisoners of war, certain countries supported

[71] 6 UST 3316, TIAS No. 3364, 75 UNTS 135, 47 AJIL Supp. 119 (1953).

[72] *See* Van Deventer, *supra* note 2, for a more detailed indication of the status of mercenaries under the Geneva Conventions.

[73] GA Res. 2465, para. 8. 23 GAOR, Supp. (No. 18) 5, UN Doc. A/7218 (1968).

[74] 24 GAOR, Supp. (No. 30) 5, UN Doc. A/7630 (1969).

[75] 25 GAOR, Supp. (No. 28) 7, UN Doc. A/8028 (1970).

[76] 28(1) GAOR, Supp. (No. 30) 142, UN Doc. A/9030 (1973).

[77] Now Article 44. For the relevant debates, see Doc. CDDH/III/SR.33–SR.36 (1975).

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

the principles in the resolutions. These countries desired to exclude mercenaries fighting for colonial or racist regimes from the protection of prisoner-of-war status and to class such persons as criminals. This would be a major departure from traditional international law, as outlined above, which has given to mercenaries the same status as the members of the belligerent force for which they are fighting.

At the 1976 session of the Conference further detailed discussion took place in the Working Group of Committee III on the treatment to be accorded mercenaries. The Report of the Committee indicated general agreement that, as a minimum, mercenaries should have no entitlement to prisoner-of-war or combatant status.[78] There was, however, disagreement over whether it should be mandatory to deprive mercenaries of such status. It was also accepted by the Working Group that "as a minimum persons found to be mercenaries should be entitled to be treated humanely and in accordance with the national law of the capturing power."[79] At the 1977 session, the provision which was adopted provided that a mercenary shall not have the right to be a combatant or prisoner of war.[80] The mere fact of being a mercenary is not, however, made a criminal act. While the article does not say so expressly, it is clearly understood that a mercenary is entitled to the basic humanitarian treatment and protections provided under the Protocol for persons in the power of a party to the conflict who are not otherwise entitled to more favorable treatment.[81]

The exaggerated assertions of the UN resolutions were not adopted at the Conference and do not appear to reflect the consensus of the international community. Nevertheless, the removal of even certain protections from combatants who would otherwise qualify for such protection must be viewed with some concern. At the same time that one is extending protection under the laws of war to guerrillas, it seems inconsistent to be taking it away from other combatants.[82] If states accept the exclusion of mercenaries from the protection of the laws of war, then the argument that war criminals as a whole [83] should not receive treatment as prisoners

[78] Doc. CDDH/III/361/Add. 1, at 3. (June 7, 1976).

[79] *Id.*

[80] *Supra* note 6.

[81] *See* the statement in the Report of Committee III, *supra* note 8, para. 27, and explanations of vote in both the committee and plenary. Doc. CDDH/III/SR.57 and Corr.1 and Doc. CDDH/SR.41 (1977). The most relevant article is Article 75 entitled "Fundamental guarantees." (This was Article 65 prior to the adoption of the final text of the Protocol). Article 45 (formerly Article 42bis), which entitles a person who claims prisoner-of-war status to have his status adjudicated by a judicial tribunal, would also seem applicable if a "mercenary" were to claim prisoner-of-war status.

[82] *See* the comments of Schwarzenberger in *Terrorists, Hijackers, Guerrilleros and Mercenaries,* 24 CURRENT LEGAL PROBLEMS 257, 281–82 (1971). He remarks that exclusion of mercenaries from human rights protection while extending it to terrorists and guerrillas is "another milestone on the high road to violence unlimited." *Id.* 282.

[83] The USSR included a reservation to its signature and subsequent ratification of

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions

of war is also likely to gain acceptance. Once protection is denied to one class of persons the way is left open for other classes to be similarly denied protection. If states consider foreign participation in national liberation struggles against colonial and racist regimes to be of such gravity as to require that certain protections not be accorded to mercenaries, it seems only logical, for the reasons given above, that such protections should not be accorded to *any* private foreign participants. This does not seem to be the trend that the law is taking.

VI.

Conclusion

A study of the practice of states and of the United Nations in situations both of internal and international conflict indicates a willingness on the part of states to limit the use of foreign nongovernmental forces, including mercenaries, where a danger to world peace and security may arise. It is suggested that states should accept as a basic principle that their nationals should not freely participate in conflicts as mercenaries and that states should take appropriate action to restrict the participation and recruitment of nationals in these circumstances. Such action would be more appropriate and consistent with the maintenance of a proper international legal order than depriving mercenaries of the protections contained in the laws of war applicable to other combatants and prisoners of war. Acceptance of such a basic principle by states also seems a much more desirable way of dealing, from a legal and humanitarian point of view, with the whole question of the intervention of private forces in armed conflicts. To deprive mercenaries of protection as combatants or prisoners of war will leave the way open for a fundamental transformation of the humanitarian law of war. From being a law applicable to all combatants in an armed conflict, it will become a law applicable to only some. This is hardly a result to be admired. While the newly adopted Protocols to the Geneva Conventions extend protection to many persons not previously covered, the provision adopted on mercenaries reflects a trend in the other direction. One can accept that mercenaries are not honorable, without depriving them of rights to which other foreign participants are entitled. The new article must, therefore, be regarded as unfortunate. If states are prepared to accept more extensive obligations to prevent their nationals from serving as mercenaries in the first place, the impact of the article may be reduced. One suspects, however, that mercenaries will continue to be a feature of armed conflicts for many years to come and that their treatment in national legislation and on the field of battle will continue to be a source of controversy.

---

the 1949 Geneva Prisoner-of-War Convention which excluded war criminals from the protections of the Convention. *See* 75 UNTS 460 (1950) for text.

This content downloaded from 132.203.227.61 on Sat, 31 Oct 2015 22:51:26 UTC
All use subject to JSTOR Terms and Conditions